

***United States Court of Appeals
for the Second Circuit***



APPENDIX

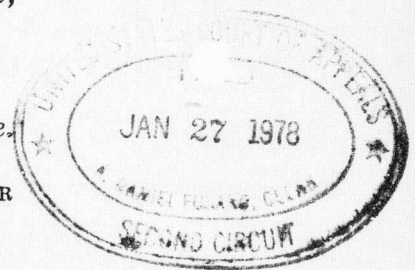
ORIGINAL
77-6201

United States Court of Appeals
For the Second Circuit.

GREAT AMERICAN INSURANCE COMPANY,
Plaintiff-Appellant,
against

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK.



APPENDIX.

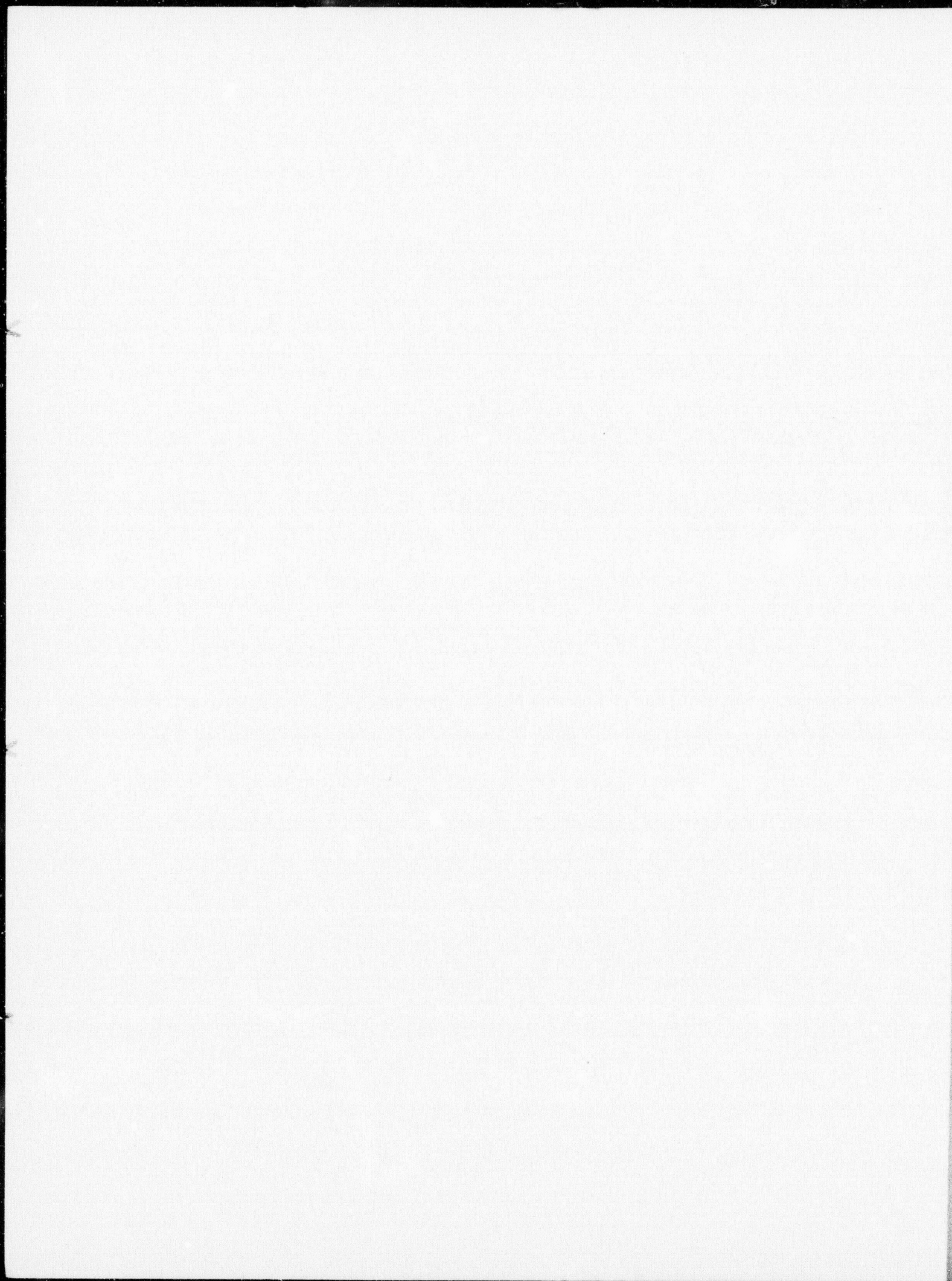
REIN, MOUND & COTTON
Attorneys for Plaintiff-Appellant
130 John Street
New York, N. Y. 10038
(212) 425-9200

DAVID G. TRAGER
*United States Attorney for the Eastern
District of New York, Attorney
for The United States of America,
Defendant-Appellee*
225 Cadman Plaza East
Brooklyn, N. Y. 11201
(212) 330-7106

PAGINATION AS IN ORIGINAL COPY

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1a

UNITED STATES COURT OF APPEALS,
FOR THE SECOND CIRCUIT,

- - - - -X

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff-Appellant,

against

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK.

- - - - -X

DOCKET ENTRIES.

Date	Proceedings
1976	
12/16	Complaint filed.
12/21	Summons ret and filed/executed.
1977	
2/24	Notice of examination before trial by plntff of defts' agents Inspector Edward Sheu and William E. Hall on 3-2-77 filed.
3/1	By PRATT, J. - Order extending time for USA to answer the complaint to 3-8-77 filed.
3/22	Notice of motion ret. 4-14-77 with emmo of law to dismiss filed.
3/28	By PRATT, J. - Order dtd. 3-26-77 extending time to answer complaint to 3-16-77 filed.

DOCKET ENTRIES

Date	Proceedings
1977	
3/31	Amended complaint filed.
4/11	By PRATT, J. - Order extending time to answer the complaint to 3-18-77 filed.
5/17	Deft's supplemental memorandum in support of its motion to dismiss filed.
5/25	Affidavit of A, Brook in opposition to defts motion to dismiss filed.
6/3	Deft's reply memorandum filed.
6/9	Before PRATT, J. - Case called for motion to dismiss. Motion argued and decision reserved.
11/1	By Pratt, J. - memorandum and order dtd 11-1-77 dismissing the complaint filed. Copies sent to parties.
11/1	Plaintiffs' memorandum of law in opposition to the deft's motion to dismiss filed.
11/1	Plaintiff's supplemental memorandum in opposition to the defts' motion to dismiss filed.
11/1	Judgment dtd 11-1-77 that plaintiff take nothing of the deft and that the complaint is dismissed filed.
11/29	Notice of appeal filed by plttf filed. Copies mailed.
12/12	Civil appeal scheduling order filed.
12/16	Notice of appeal by plttf filed.
12/16	Record certified and handed to Ellen Rosenberg for hand delivery to C of A.
12/21	Acknowledgment received from C. of A. for entire RECORD ON APPEAL, filed.

3a

SUMMONS.

United States District Court

FOR THE

EASTERN DISTRICT OF NEW YORK

CIVIL ACTION FILE NO. 76 C 2258

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff

v.

THE UNITED STATES OF AMERICA,

Defendant

SUMMONS

To the above named Defendant :

You are hereby summoned and required to serve upon REIN, MOUND & COTTON, ESQS., plaintiff's attorney, whose address is 130 JOHN STREET, NEW YORK, NEW YORK 10038, an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

LEWIS ORGEL

Clerk of Court.

LINDA DANE

Deputy Clerk.

Date: New York, New York
December 16th, 1976

[Seal of Court]

COMPLAINT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

760 2258
X

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff,

PLAINTIFF DEMANDS TRIAL
BY JURY

-against-

THE UNITED STATES OF AMERICA,

COMPLAINT

Defendant.

-----X
Plaintiff, by its attorneys, Rein, Mound & Cotton,
complaining of the defendant, alleges:

1. This action is brought under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq. as herein-after more fully appears.

2. Plaintiff is an insurance company incorporated under the laws of the State of New York and duly authorized to do business therein.

3. Plaintiff issued its policy No. 4538742 effective July 16th, 1971, which policy insured premises 623 Hawthorne Street, West Hempstead, New York against damage and loss caused by fire, vandalism, malicious mischief and various other perils.

4. The aforesaid policy of insurance covered the interests in the aforementioned premises of the owners thereof, the first mortgagee and the second mortgagee.

5. Upon information and belief, in late 1972 and/or early 1973, while said insurance policy was in effect, tenants residing in said insured premises were placed under the protection of the United States Government in connection with

COMPLAINT

investigations into organized crime.

6. Upon information and belief, in the late night and early morning hours of January 5-6, 1973, under the direction, supervision and protection of United States Marshals, and with the participation of such United States Marshals, said tenants vacated the aforesaid insured premises and in that process, removed from those premises fixtures and numerous other items of property which had been affixed to and had been part of the realty and which did not belong to said tenants, such property so removed including lighting fixtures, plumbing fixtures, hardware, door fittings, cabinets, sinks, dishwasher, ranges, built-in grills, electrical switch plates and wiring, built-in mirrors, electrical fixtures, bathroom and shower fittings, ceiling fixtures and fans, built-in carpeting, washers and dryers and other items of property totalling approximately 43,000 pounds in weight.

7. Upon information and belief, in addition to removing the aforescribed property, the said tenants, under the direction, supervision and protection of United States Marshals and with the participation of such United States Marshals, caused extensive damage to the insured premises and insured abutting grounds.

8. Upon information and belief, subsequently, with the sanction and authority of the United States Marshals, the aforementioned tenants were allowed to have sold at auction approximately 20,000 pounds of said fixtures, appliances and other property which had been unlawfully removed by them as aforescribed and which did not belong to them, with the proceeds of

COMPLAINT

such sale going either to said tenants or to the United States Government or both.

9. Upon information and belief, at the time and place of the aforescribed occurrences, the aforementioned United States Marshals were regularly in the service of and employ of the United States Marshals Service, a department of the defendant United States of America, and were acting within the scope of their office and authority.

10. Upon information and belief, the identities of the aforescribed tenants, known prior to January 5-6, 1973 as Herbert Hurwitz and Irene Hurwitz, have been changed, said new identities and location of these individuals being a secret known only to the United States Government.

11. The United States Marshals were negligent in that they stood by and failed to prevent the removal by the tenants of appliances, fixtures and other portions of the realty and other property from said premises; in that they assisted said tenants in effecting such removal; in that they stood by and failed to prevent the aforescribed destruction by said tenants to the premises and abutting grounds; in that by their supervision and protection of said tenants, they assisted the said tenants in effecting said destruction; in that they failed to inform the owners of the premises, the mortgagees or the local Police Department that the aforescribed removal and destruction were going on, so that such removal and destruction could be prevented by the local authorities; in that they

COMPLAINT

sanctioned and authorized the sale of some 20,000 pounds of said fixtures, appliances and other property wrongfully removed from the aforesaid premises, despite the fact that they knew or should have known that such fixtures, appliances and other property did not belong to the aforesaid tenants; and in that they were otherwise negligent in the premises.

12. Claim was made upon the plaintiff by the owners and mortgagees of the aforescribed premises for payment to said parties pursuant to the terms of plaintiff's insurance policy with respect to the damage to and loss from the premises caused by the tenants and the United States Marshals.

13. Because of questions of coverage and other matters, the aforesaid claim was resisted and was litigated in a lawsuit in the Supreme Court of the State of New York, County of Nassau, such lawsuit being resolved by the payment by the plaintiff herein of the sum of \$18,699.80 to Robert Associates, a partnership, which was title holder and second mortgagee, and The Chase Manhattan Bank, N.A., which was first mortgagee, said payment being made December 15th, 1975.

14. By virtue of the aforescribed payment, the plaintiff became subrogated to any right, claim, demand or rights of action existing for the benefit of Robert Associates or The Chase Manhattan Bank, N.A. and the right to recover the amounts paid by the plaintiff under the aforesaid policy of insurance for loss and damage caused by the negligence of the United States Marshals and the tenants as aforescribed.

COMPLAINT

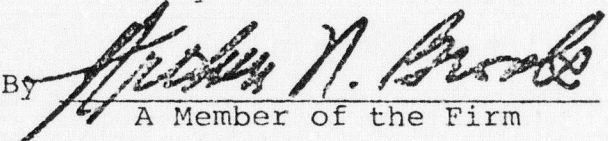
15. On May 21st, 1976, a claim was duly filed on behalf of the plaintiff herein with the United States Marshals Service, a department of the defendant United States of America. Said claim was denied by letter of William E. Hall, Director of the United States Marshals Service, dated November 10th, 1976, copy of which is annexed hereto, and this suit was duly commenced within six months of denial of said claim.

WHEREFORE, plaintiff Great American Insurance Company demands judgment against defendant United States of America in the sum of \$18,699.80 with interest thereon from December 15th, 1975, together with the costs and disbursements of this action.

Dated: New York, New York
December 15th, 1976

REIN, MOUND & COTTON
Attorneys for Plaintiff

By


A Member of the Firm

Office and P.O. Address:
130 John Street
New York, New York 10038
(212) 425-9200

LETTER, DATED NOVEMBER 10, 1976, ANNEXED TO COMPLAINT.



OFFICE OF THE DIRECTOR

United States Department of Justice

UNITED STATES MARSHALS SERVICE

Washington, D.C. 20530

November 10, 1976

CERTIFIED - RETURN RECEIPT REQUESTED

Rein, Mound & Cotton
Counselors at Law
130 John Street
New York, New York 10038

Re: Administrative Claim of
Great American Insurance Company

Dear Sir:

Reference is made to the administrative claim of your client Great American Insurance Company which you have filed against the U.S. Government for \$18,699.80.

The applicable provisions of the Federal Tort Claims Act [28 U.S.C. 2675(a)] provide for the payment of claims which arise out of the negligent or wrongful acts or omission of an employee of the Federal government while acting within the scope of his employment.

Subsequent to the receipt of this claim, this office investigated the circumstances surrounding your alleged damages. This investigation disclosed no evidence of negligence or wrongful acts on the part of our personnel. Therefore, the claim of Great American Insurance Company in the amount of \$18,699.80 is hereby denied.

If you are dissatisfied with our determination, you may file suit in the appropriate U.S. District Court not later than six (6) months after the date of the mailing of this notice of final denial.

Sincerely,

William E. Hall

WILLIAM E. HALL
Director

NOTICE OF MOTION.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - X
GREAT AMERICAN INSURANCE COMPANY,

Plaintiff,

- against -

THE UNITED STATES OF AMERICA,

Defendant.

- - - - - X

S I R S :

PLEASE TAKE NOTICE that the defendant, UNITED STATES OF AMERICA will move this Court, before the Honorable GEORGE C. PRATT, District Judge, at the United States Court-house, 900 Ellison Avenue, Westbury, New York, on the 14th day of April, 1977, at 2:00 o'clock in the afternoon of that day, or as soon thereafter as counsel can be heard, for an order dismissing the above-entitled action for lack of jurisdiction over the subject matter pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the

NOTICE OF MOTION

Civil Action No.
76 C 2258

11a

NOTICE OF MOTION

grounds that plaintiff failed to timely file an administrative claim, and for such other and further relief as this Court shall deem just and proper.

Dated: Brooklyn, New York
March 18, 1977

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendant
225 Cadman Plaza East
Brooklyn, New York 11201

By: _____
CONSTANCE M. VECCELLIO
Assistant U. S. Attorney

TO: Rein, Mound, Cotton, Esqs.
Attorneys for Plaintiff
130 John Street
New York, New York 10038

AMENDED COMPLAINT,

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

GREAT AMERICAN INSURANCE COMPANY,

Civil Action No. 76 C 2258

Plaintiff,

PLAINTIFF DEMANDS TRIAL
BY JURY

-against-

THE UNITED STATES OF AMERICA,

AMENDED COMPLAINT

Defendant.

-----X

Plaintiff, by its attorneys, Rein, Mound & Cotton,
complaining of the defendant, alleges:

AS AND FOR A FIRST CAUSE OF ACTION:

1. This action is brought under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 2671 et seq. as herein-after more fully appears.
2. Plaintiff is an insurance company incorporated under the laws of the State of New York and duly authorized to do business therein.
3. Plaintiff issued its Policy No. 4538742 effective July 16th, 1971, which policy insured premises 623 Hawthorne Street, West Hempstead, New York against damage and loss caused by fire, vandalism, malicious mischief and various other perils.
4. The aforesaid policy of insurance covered the interests in the aforementioned premises of the owners thereof, the first mortgagee and the second mortgagee.
5. Upon information and belief, in late 1972 and/or early 1973, while said insurance policy was in effect, tenants residing in said insured premises were placed under the protection of the United States Government in connection with

AMENDED COMPLAINT

investigations into organized crime.

6. Upon information and belief, in the late night and early morning hours of January 5-6, 1973, under the direction, supervision and protection of United States Marshals, and with the participation of such United States Marshals, said tenants vacated the aforesaid insured premises and in that process, removed from those premises fixtures and numerous other items of property which had been affixed to and had been part of the realty and which did not belong to said tenants, such property so removed including lighting fixtures, plumbing fixtures, hardware, door fittings, cabinets, sinks, dishwasher, ranges, built-in grills, electrical switch plates and wiring, built-in mirrors, electrical fixtures, bathroom and shower fittings, ceiling fixtures and fans, built-in carpeting, washers and dryers and other items of property totalling approximately 43,000 pounds in weight.

7. Upon information and belief, in addition to removing the aforescribed property, the said tenants, under the direction, supervision and protection of United States Marshals and with the participation of such United States Marshals, caused extensive damage to the insured premises and insured abutting grounds.

8. Upon information and belief, subsequently, with the sanction and authority of the United States Marshals, the aforementioned tenants were allowed to have sold at auction approximately 20,000 pounds of said fixtures, appliances and other

AMENDED COMPLAINT

property which had been unlawfully removed by them as aforedescribed and which did not belong to them, with the proceeds of such sale going either to said tenants or to the United States Government or both.

9. Upon information and belief, at the time and place of the aforedescribed occurrences, the aforementioned United States Marshals were regularly in the service of and employ of the United States Marshals Service, a department of the defendant United States of America, and were acting within the scope of their office and authority.

10. Upon information and belief, the identities of the aforedescribed tenants, known prior to January 5-6, 1973 as Herbert Hurwitz and Irene Hurwitz, have been changed, said new identities and location of these individuals being a secret known only to the United States Government.

11. The United States Marshals were negligent in that they stood by and failed to prevent the removal by the tenants of appliances, fixtures and other portions of the realty and other property from said premises; in that they assisted said tenants in effecting such removal; in that they stood by and failed to prevent the aforedescribed destruction by said tenants to the premises and abutting grounds; in that by their supervision and protection of said tenants, they assisted the said tenants in effecting said destruction; in that they failed to inform the owners of the premises, the mortgagees or the local Police Department that the aforedescribed removal and

AMENDED COMPLAINT

destruction were going on, so that such removal and destruction could be prevented by the local authorities; in that they sanctioned and authorized the sale of some 20,000 pounds of said fixtures, appliances and other property wrongfully removed from the aforesaid premises, despite the fact that they knew or should have known that such fixtures, appliances and other property did not belong to the aforesaid tenants; and in that they were otherwise negligent in the premises.

12. Claim was made upon the plaintiff by the owners and mortgagees of the aforescribed premises for payment to said parties pursuant to the terms of plaintiff's insurance policy with respect to the damage to and loss from the premises caused by the tenants and the United States Marshals.

13. Because of questions of coverage and other matters, the aforesaid claim was resisted and was litigated in a lawsuit in the Supreme Court of the State of New York, County of Nassau, such lawsuit being resolved by the payment by the plaintiff herein of the sum of \$18,699.80 to Robert Associates, a partnership, which was title holder and second mortgagee, and The Chase Manhattan Bank, N.A., which was first mortgagee, said payment being made December 15th, 1975.

14. By virtue of the aforescribed payment, the plaintiff became subrogated to any right, claim, demand or rights of action existing for the benefit of Robert Associates or The Chase Manhattan Bank, N.A. and the right to recover the amounts paid by the plaintiff under the aforesaid policy of insurance for loss and damage caused by the negligence of the United States

AMENDED COMPLAINT

Marshals and the tenants as aforescribed.

15. On May 21st, 1976, a claim was duly filed on behalf of the plaintiff herein with the United States Marshals Service, a department of the defendant United States of America. Said claim was denied by letter of William E. Hall, Director of the United States Marshals Service, dated November 10th, 1976, copy of which is annexed hereto, and this suit was duly commenced within six months of denial of said claim.

16. As a result of the aforesaid, plaintiff has been damaged in the sum of \$18,699.80.

AS AND FOR A SECOND CAUSE OF ACTION:

17. Plaintiff repeats and realleges each and every allegation contained in Paragraphs 1 through 13 and 15 of this complaint, as if set forth in full herein.

18. Defendant is liable to the plaintiff by way of indemnity and must indemnify the plaintiff to the full extent of the aforesaid \$18,699.80 by reason of the fact that the damages which plaintiff herein was legally obligated to pay were caused solely by the negligent and wrongful acts and omissions of the United States Marshals Service as alleged in Paragraphs 6, 7, 8, 9, 10 and 11 herein.

WHEREFORE, plaintiff Great American Insurance Company demands:-

A) Judgment against defendant United States of America on the first cause of action in the sum of \$18,699.80 with inter-

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AMENDED COMPLAINT

est thereon from December 15th, 1975;

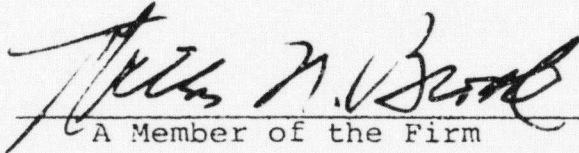
B) Judgment against defendant United States of America
on the second cause of action in the sum of \$18,699.80 with
interest thereon from December 15th, 1975;

together with the costs and disbursements of this action.

Dated: New York, New York
March 29th, 1977

REIN, MOUND & COTTON
Attorneys for Plaintiff

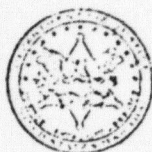
By


A Member of the Firm

Office and P.O. Address:
130 John Street
New York, New York 10038
(212) 425-9200

LETTER, DATED NOVEMBER 10, 1976, ANNEXED TO
AMENDED COMPLAINT.

United States Department of Justice



OFFICE OF THE DIRECTOR

UNITED STATES MARSHALS SERVICE

Washington, D.C. 20530

November 10, 1976

CERTIFIED - RETURN RECEIPT REQUESTED

Rein, Mound & Cotton
Counselors at Law
130 John Street
New York, New York 10038

Re: Administrative Claim of
Great American Insurance Company

Dear Sir:

Reference is made to the administrative claim of your client Great American Insurance Company which you have filed against the U.S. Government for \$18,699.80.

The applicable provisions of the Federal Tort Claims Act [28 U.S.C. 2675(a)] provide for the payment of claims which arise out of the negligent or wrongful acts or omission of an employee of the Federal government while acting within the scope of his employment.

Subsequent to the receipt of this claim, this office investigated the circumstances surrounding your alleged damages. This investigation disclosed no evidence of negligence or wrongful acts on the part of our personnel. Therefore, the claim of Great American Insurance Company in the amount of \$18,699.80 is hereby denied.

If you are dissatisfied with our determination, you may file suit in the appropriate U.S. District Court not later than six (6) months after the date of the mailing of this notice of final denial.

Sincerely,

William E. Hall

WILLIAM E. HALL
Director

AFFIDAVIT OF ARTHUR N. BROOK.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

GREAT AMERICAN INSURANCE COMPANY, Civil Action No. 76 C 2258

Plaintiff,

-against-

AFFIDAVIT IN OPPOSITION

THE UNITED STATES OF AMERICA,

Defendant.

-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ARTHUR N. BROOK, being duly sworn, deposes and says:

I am a member of the firm of Rein, Mound & Cotton, the attorneys for the plaintiff in this action and, as such, am fully familiar with all of the facts in the matter and the proceedings had heretofore. I am submitting this affidavit in opposition to the defendant's motion by which it is seeking an order dismissing the action on the ground that claim had not been timely filed against the United States.

Initially, the owners and mortgagees of premises located at 623 Hawthorne Street, West Hempstead, New York made claim upon The Great American Insurance Company for payment under its Policy No. 4538742 because of damage and destruction at those premises caused while tenants Irene and Herbert Hurwitz were moved out of the premises under the direction, supervision and protection of United States Marshals. That removal, which took place in the middle of the night in January 1973, left the premises a shambles

AFFIDAVIT OF ARTHUR N. BROOK

of destruction. The Nassau County Police list the occurrence as a burglary and grand larceny. They apparently were able to go no further since the Hurwitzes, after leaving with United States Marshals and 43,000 pounds of property largely not belonging to them, have been secreted by the Government, given new identities and otherwise made unavailable.

The owners and mortgagees, Robert Associates and The Chase Manhattan Bank, brought suit against The Great American in the Supreme Court of the State of New York, County of Nassau. That suit was entitled Robert Associates against The Great American Insurance Company, The Chase Manhattan Bank, N.A., Edith Kanof a/k/a Edith Kaplan, Irene Hurwitz and Herbert Hurwitz. It sought recovery of \$45,000. Though The Chase Manhattan Bank and Edith Kanof were nominally defendants, their true position was one of plaintiffs, The Chase being a mortgagee and Kanof allegedly having some ownership interest in the premises. Irene and Herbert Hurwitz were never served with process in that action.

If the requisite diversity jurisdiction had existed in that action, The Great American would have been able to remove the action to the Federal Court and join the United States as a third-party defendant pursuant to the Federal Tort Claims Act. Had that been possible, the Government would never be in a position of contending that the claim against it is outside the applicable statute of limitations. Unfortunately, there was no proper diversity jurisdiction and the case could not be removed. Furthermore, the Government could not be sued in the state court where the

AFFIDAVIT OF ARTHUR N. BROOK

initial action was pending. Hence, it was insulated from being made part of that action. It is now trying to continue that insulation, even though the active tort feasons in this incident were employees and agents of the United States.

After the completion of pre-trial discovery in the Nassau County lawsuit, the parties worked out a settlement of the \$45,000 lawsuit in the sum of \$18,699.80. The settlement was worked out after the precise ownership and mortgage interests were unscrambled, the payment being made to Robert Associates, which was title holder and second mortgagee, and The Chase Manhattan Bank, which was first mortgagee. Payment was made on December 15th, 1975.

The United States is getting the benefit of The Great American's settlement of a \$45,000 lawsuit for only \$18,699.80. On May 21st, 1976, a claim for this latter amount was duly filed with the United States Marshals Service. On November 10th, 1976, that claim was denied on the merits by William E. Hall, Director of the United States Marshals Service. This action ensued shortly thereafter.

The amended complaint contains two causes of action, the first cause of action sounding in subrogation and the second cause of action in indemnity. The Government has taken the position that the claim underlying the first cause of action accrued when the tortious acts were committed in January 1973. Hence, says the Government, claim would have had to be made within two years after January 5-6, 1973 pursuant to the requirements of 28 U.S.C. Section

AFFIDAVIT OF ARTHUR N. BROOK

2401(b). As to the second cause of action, the Government concedes that a claim for indemnity would not accrue until the indemnitee (The Great American) made payment, which in this case was in December 1975. The Government argues, however, that this is not truly an indemnity claim and, hence, it is barred by statute of limitations.

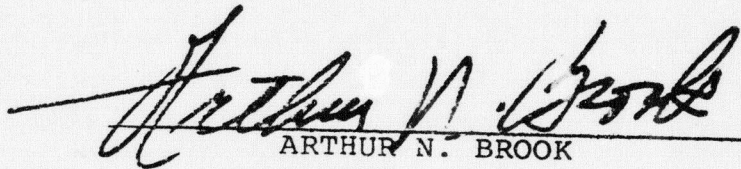
The accompanying memorandum of law will demonstrate that the essence of the action against the Government, both first and second causes of action, is one of indemnity and, being such, means that no claim accrued to The Great American until it made payment to the owners and mortgagees. To find otherwise would serve to defeat the purposes of the Tort Claims Act as well as the fundamental principle that everyone is responsible for the consequences of his own acts and that ultimate liability should be borne by the parties ultimately responsible for the loss. But for the fact that insufficient diversity existed in the Nassau County action, the United States would have been brought in at that time. That would have been the ideal situation since all of the issues and questions of ultimate responsibility could have been determined in that one action. Because of the diversity disability, The Great American had to institute this independent action seeking indemnification for the amount of its payment. It had no right to institute this action until after it made its payment. Hence, the claim now asserted did not accrue until it made that payment.

The action against the United States, stripped of formalistic labels, is surely one for indemnity. Hence, the

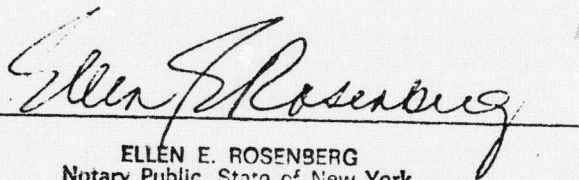
AFFIDAVIT OF ARTHUR N. BROOK

Government's motion should be denied.

WHEREFORE, it is respectfully submitted that the within motion be denied in all respects.


ARTHUR N. BROOK

Sworn to before me this 20th
day of May, 1977.



ELLEN E. ROSENBERG
Notary Public, State of New York
No. 41-4809734
Qualified in Queens County
Commission Expires March 30, 1979

MEMORANDUM AND ORDER OF JUDGE PRATT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

GREAT AMERICAN INSURANCE COMPANY, DOCKET NO. 76 C 2258

Plaintiff,

- against -

THE UNITED STATES OF AMERICA,

MEMORANDUM AND ORDER

Defendant.

----- x

PRATT, J:

Plaintiff insurance company brought this action under the Federal Tort Claims Act to recover sums paid to its insureds in settlement of their claims under plaintiff's policy of insurance against loss from fire, vandalism, malicious mischief, and various other perils. The government has moved to dismiss the complaint on the ground that plaintiff's administrative claim was not timely filed with the U.S. Marshal's Service. 28 USC §2401(b).

Plaintiff had issued its policy in 1971 covering certain residential premises which, at the time of the incidents in question were owned by a partnership, Robert Associates, subject to a first mortgage held by Chase Manhattan Bank. Robert Associates also held a second mortgage, and the former owners, Irene and Herbert Hurwitz, occupied the premises as rent-paying tenants.

MEMORANDUM AND ORDER OF JUDGE PRATT

Allegedly in connection with some federal investigations into organized crime, the Hurwitzes were offered government protection and, aided by United States marshals, vacated the premises in the early morning hours of January 5-6, 1973. As they departed, and with the alleged assistance or at least non-interference of the marshals, the Hurwitzes removed many items of property which plaintiff claims were part of the realty, including lighting and plumbing fixtures, cabinets, sinks, built-in appliances, carpeting, etc. In addition, plaintiff alleges that extensive damage to the building itself was caused by the Hurwitzes and the marshals. Plaintiff further alleges that the Hurwitzes were later permitted to sell at auction many of the items claimed to be unlawfully removed, with the proceeds going either to them or to the government.

A subsequent investigation by the Nassau County Police Department listed the occurrences of January 5-6, 1973 as burglary and grand larceny, but no further action was taken by that department. Plaintiff has been unable to locate the Hurwitzes and believes that they have been sequestered under government protection with new identities known only to the government. Based on the damage to and theft from the premises, the owner and mortgagee brought suit in Nassau County Supreme Court against the plaintiff seeking recovery under the insurance policy. Plaintiff

MEMORANDUM AND ORDER OF JUDGE PRATT

ultimately settled that suit on December 15, 1975 by payment of \$18,699.80 to the owner, Robert Associates, and to the first mortgagee, Chase Manhattan Bank.

Five months later plaintiff filed a claim for the amount it had paid out under the policy with the U.S. Marshals' Service, which denied the claim on November 10, 1976. This suit followed. The amended complaint sets forth two causes of action: the first describes the underlying events, the New York Supreme Court suit, and plaintiff's payment in settlement thereof. It then alleges that by virtue of the payment, plaintiff became subrogated to the owner's and mortgagee's right to recover for the damage caused to the premises. ¶14 of amended complaint. The second cause of action is identical to the first, except instead of a right of subrogation, plaintiff alleges that its claim is one for "indemnity". ¶18 of amended complaint.

The government moves to dismiss on the ground that plaintiff did not file its claim with the federal agency, here the Marshals' Service, until more than two years after the damage to the property, the time when, the government argues, plaintiff's claim accrued. Both parties agree that if plaintiff's claim arises from its right of subrogation, then the government's limitations defense is valid and the claim must be dismissed. In effect, therefore, plaintiff agrees that its first cause of action which asserts a sub-

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rogation right, is barred by the two year filing requirement of 28 USC §2401(b). Consequently, the first cause of action is dismissed.

Plaintiff claims, however, that its second cause of action asserting a claim based on indemnity, is not barred by the two year limitations period because the right to indemnification does not accrue until the claimant has actually made the payment for which it seeks to be indemnified. The government does not contest plaintiff's interpretation of when an indemnification claim accrues. Instead it argues that plaintiff's claim does not qualify as one for indemnification, but arises solely out of plaintiff-insurer's derivative right of subrogation.

Clearly, if plaintiff's claim is that of indemnity, its cause of action accrued when plaintiff finally paid the settlement of the underlying claim on its insurance contract. See Kantlehner v. United States, 279 F Supp 122, 128 (EDNY 1967). On the other hand, if the claim asserted by plaintiff insurance company against the government is one arising out of its right of subrogation, then the cause of action accrued upon the occurrence of the original tortious injury, because as subrogee, plaintiff stands in the subrogor's position. United States v. Munsey Trust Co., 332 US 234, 242 (1947).

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"The general rule is that an insurer, on paying a loss, is subrogated in a corresponding amount to the insured's right of action against any other person responsible for the loss." 6A Appleman, "Insurance Law and Practice" §4051 at 103 (1972). See 31 NY Jurisprudence, Insurance §1619 at 509; §1620 at 510, 512; §1624 at 520. Although a fire insurance policy is an indemnity contract as between the insurer and the insured, after paying the loss, the insurer becomes subrogated to the rights and remedies of the insured and may maintain an action against a third party wrongdoer. Connecticut Fire Ins. Co. v. Erie Ry. Co., 73 NY 399, 402. See 6A Appleman, "Insurance Law and Practice", §4051 at 113 (1972).

Plaintiff argues that the difference between indemnification and subrogation is not only elusive, but virtually nonexistent. It compares the difference as "that between cherubim and seraphim in the angelic orders", citing United States Lines, Inc. v. United States, 470 F2d 487 (CA5 1972).

In support of its argument that the claim here should be viewed as one for indemnification, plaintiff relies primarily upon United States v. Farr and Co., 342 F2d 383 (CA2 1965), Kantlehner v. United States, 279 F Supp 122 (EDNY 1967), Newsum v. Pennsylvania Railroad Company, 79 F Supp 225 (SDNY 1948), Chicago, Rock Island and Pacific Ry. Co.

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v. United States, 220 F2d 939 (CA7 1955), and U.S. Lines, Inc. v. United States, 470 F2d 487 (CA5 1972). None of those cases, however, involved a claim by an insurance company. On the contrary, each involved a claim for indemnification by a party who was a participant in, or in some way had an interest in, the underlying transaction but who, by contract or by operation of law, had a right to recover from the defendant all or part of the moneys already paid out. When dealing with insurance companies, the rule is different, for the insurance company's claim arises solely from the principle of subrogation, thereby leaving the insurance company with no greater and no lesser position than had its subrogor. An insurer who fails to assert its claim within the limitations period applicable to the claim of its insured may be denied recovery. Williams v. Globe Indemnity Company, 507 F2d 837 (CA8 1974).

Plaintiff argues that if its claim is classified as one of "subrogation", it would be left in the position of having the limitations period expire before the claim even accrued. Undoubtedly, a rule which actually barred a claim before its accrual would be unjust. Such is not the effect here, however. While plaintiff could not in its own name alone bring suit against the persons responsible for damage to the house until plaintiff had actually made payment under its policy, the "claim" which plaintiff asserts is the claim

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of the owner and mortgagee for damage to the premises, and clearly that "claim" "accrued" in 1973 when the damage was done. Upon payment of the loss under its insurance policy plaintiff acquired, or was subrogated to, the "claim" for damage to the premises. But the claim itself had already "accrued". True, plaintiff's right to directly and independently assert that claim arose at the time of payment. But to refer to payment as the time when the "claim" for damage to the property "accrued" is misleading and inaccurate.

Nor is plaintiff correct when it argues that there was no way it could have preserved its right to sue the government on the fact picture presented here. In its insurance policy plaintiff could have required the insureds to cooperate by timely asserting directly against the original tortfeasors any claim to which plaintiff might become subrogated. See Meredith v. Ionian Trader, 279 F2d 471 (CA2 1960).

Where an insurer seeks to recover against third party tortfeasors after paying the insured for his loss, courts have consistently treated the insurer's claim as "subrogation" not "indemnity". In part, the decisions may arise from the policy considerations that insurance companies are in the business of taking risks, are aware of statute of limitations problems, and are able in large part to protect themselves through the provisions of their insurance

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contracts.

The claim which plaintiff asserts is not one for indemnity, but is a claim for property damage to which plaintiff as an insurer was subrogated. The period for filing that claim with the administrative agency accrued when the damage occurred, not when plaintiff settled and paid loss claims of the owner and mortgagee. Since that damage occurred more than two years prior to plaintiff's filing the agency claim, plaintiff's action is barred by 28 USC §2401(b). Accordingly, the complaint is dismissed.

SO ORDERED.

Dated: Westbury, New York
November 1, 1977.

GEORGE C. PRATT
U. S. DISTRICT JUDGE

JUDGMENT.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

-----x
GREAT AMERICAN INSURANCE COMPANY,

★ NOV 1 1977 ★

Plaintiff,

TIME A.M. _____
P.M. _____

- against -

JUDGMENT
76 C 2258

THE UNITED STATES OF AMERICA,

Defendant.
-----x

FILED

A memorandum and order of Honorable George C. Pratt,
United States District Judge, having been filed on November 1,
1977, granting the defendant's motion to dismiss the complaint
it is

ORDERED and ADJUDGED that the plaintiff take nothing of
the defendant and that the complaint is dismissed.

Dated: Westbury, New York
November 1, 1977

Louis Angel
Clerk

By *Margaret Quint*
Deputy Clerk

service of three (3) copies of

the within

is

hereby admitted this 26th day

January

1978

Sylvia Morris for David Page

Attorney for

1126178